

BEFORE THE
GOVERNING BOARD OF THE
SOUTH BAY UNION SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of
Certain Employees of the South Bay Union
School District Identified in Appendices A,
B and C.

OAH No. 2011020736

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Escondido, California, on April 27, 2011.

Clifford D. Weiler, Atkinson, Andelson, Loya, Rudd & Romo, Attorneys at Law, represented South Bay Union School District ("District").

Jon Vanderpool, Tosdal, Smith, Steiner & Wax, represented 16 of the respondents listed in Appendix A, and 8 of the respondents listed in Appendix B, both of which are attached hereto and by this reference incorporated herein.

Jack Cottrell, CTA Retired Staff, represented 13 of the respondents listed in Appendix C attached hereto and by this reference incorporated herein.

No appearance was made by or on behalf of respondents Elizabeth Malls and Saul Ambriz, although each filed a notice of Defense.

Respondent Alexandra Vargas, a teacher at the Nestor Language Academy, received a precautionary layoff notice but resigned from her teaching position before this hearing.

Respondents Deborah McFerrin, Lisa Powell, Liliana Robles and Cristina Vaz failed to file Requests for Hearing and did not appear.

The matter was submitted on April 27, 2011.

DEFAULT

As to Deborah McFerrin, Lisa Powell, Liliana Robles and Cristina Vaz, on proof of compliance with Government Sections 11505 and 11509, this matter proceeded as a default pursuant to section 11520.

FACTUAL FINDINGS

1. Kim Phifer, Assistant Superintendent, Human Resources, South Bay Union School District, made and filed the accusation in her official capacity.
2. Respondents are identified in Appendices A, B and C, attached hereto and by this reference are incorporated herein. Each respondent is a certificated employee of the District.
3. On March 3, 2011, the Governing Board adopted Resolution Number 11-115, reducing particular kinds of services and directing the Superintendent to give appropriate notices to certificated employees whose positions would be affected by the action. The resolution identified 89.0 FTEs to be reduced.
4. Resolution Number 11-115 authorized the District, pursuant to Education Code section 44955, subdivision (d)(1), to deviate from terminating certificated employees in order of seniority and determined that:

“there are specific needs for personnel to teach in this school district’s visual performing arts program at Mendoza Elementary School, to teach and otherwise serve in certificated positions in the Nestor Language Academy, and to serve as Academic Coaches, that each of those constitutes a specific course or course of study within the meaning of Education Code section 44955, subdivision (d)(1), and that those employees currently serving or, for purposes of “bumping” into those particular courses or courses of study who fulfill the competency standards herein below, possess special training and experience to teach in each applicable such course or course of study.”
5. Resolution Number 11-115, section 5, defined “competency” for the purposes of bumping as all of the following:

(a)(1) the criteria set forth within Board Policy 4117 (“To be considered competent, an employee must have academic training and one year of full-time experience in the specialized area to which the district would be able to assign him/her. The

district will also consider the recency of the employee's experience"), such that to allow for "bumping" or reemployment must have previously served in this school district for at least one school year of continuous full-time experience in those particular kinds of services into which the employees will bump or be reemployed."

(a)(2) In applying this criterion of (a)(1), it is not necessary for the junior employee to have served in that particular kind of service for at least one school year in order to prevent a senior employee from "bumping" or displacing that junior employee. That junior employee who is currently serving in the position into which the senior employee would otherwise bump, has the more current experiences and training within that particular kind of service in which he or she is currently serving, and the lack of completion of one school year by the junior employee in that position does not nullify the application of the "bumping" or displacement standard necessary for the more senior employee to "bump" or displace the junior employee serving in that particular kind of service.

(b) possession and current filing of a preliminary or clear credential for the subject matter into which the employee would bump for the 2011-2012 school year or be reemployed, and

(c) highly qualified status within the meaning of the No Child Left Behind Act (if required or appropriate for the position into which the employee would bump for the 2011-2012 school year or be reemployed), and

(d) an appropriate EL authorization (if required or appropriate for the position into which the employee would bump for the 2011-2012 school year or be reemployed).

6. Resolution number 11-115 further provided that:

In addition to the criteria referenced above in section 5, Education Code section 44955, subdivision (d)(1), shall be implemented to deviate from terminating certificated employees in order of seniority, as related to at least the following specific courses and/or courses of study:

(A) the visual performing arts program at Mendoza Elementary School

(B) Academic Coaches

(C) the Nester Language Academy's certificated staff such as classroom teachers and its resource teacher

The certificated employees currently serving in those specific course or courses of study shall be "skipped" and not subject to layoff, as permitted by Education Code section 44955, subdivision (d)(1) due to the current employees serving in those specific courses and/or courses of study possessing special training and experience necessary to teach each respective course or course of study, which others with more seniority do not possess. Such employees also shall not be "bumped" or displaced by any more senior employee, and no employee shall be reemployed into any of the above specific courses or courses of study and particular kinds of services unless such employee meets the qualifications within section 5, above.

7. On March 3, 2011, the Board of Trustees adopted Resolution No. 11-116 determining that all presently employed temporary certificated employees shall not be reemployed for the 2011-2012 school year and directing the Superintendent to give appropriate notices to certificated employees whose positions would be affected by the action. The resolution further determined that the employment of any temporary employee who was previously laid off and accepted reemployment as a temporary employee did not constitute a reinstatement of employment or affect any rights possessed by such employees under the Education Code. Resolution No. 11-116 identified 13 temporary teachers who were previously laid off and accepted reemployment as a temporary employee.

8. On March 3, 2011, the Board of Trustees adopted Resolution No. 11-117 determining that two assistant principals be released and directing the Superintendent to give appropriate notices to those two certificated employees.

9. Consistent with the Board's Resolution, the District identified certificated employees for layoff. The decision to reduce or discontinue a particular kind of service is a matter reserved to the district's discretion and is not subject to second-guessing in this proceeding. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.) A school district's decision to reduce a particular kind of service must not be fraudulent, arbitrary or capricious. (*San Jose Teachers Association v. Allen* (1983) 144 Cal. App. 3d 627, 637.)

10. The District implemented a bump analysis to determine which employees could bump into a position being held by a junior employee. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who is filling that position. (*Lacy v. Richmond Unified School District*

(1975) 13 Cal.3d 469, 473-474.) No evidence was introduced that the District had improperly “bumped” any employees.

11. The District considered attrition, resignations, retirements and requests for transfer in determining the actual number of layoff notices necessary to be delivered to its employees. No evidence was presented that any known positively assured attrition was not considered.

12. On or before March 15, 2011, the District timely served on Respondents a written notice that the Superintendent had recommended that their services would be terminated at the close of the current school year. The reasons for the recommendation were set forth in these preliminary layoff notices.

13. An accusation was served on each respondent. All prehearing jurisdictional requirements were met.

14. The layoffs will not reduce any of the District’s offerings in code mandated courses below the level required by law.

15. An accusation was served on each respondent. All prehearing jurisdictional requirements were met.

Precautionary Layoff Issues

16. The District issued precautionary layoff notices to ensure that it could reduce its force in sufficient numbers as ordered by the Board. There was nothing improper in the district taking this precaution. Given the recommendations noted in this decision, at this juncture, none of the precautionary layoff notices can be rescinded until such time as the District complies with those recommendations. Some of the recommendations may result in employees who initially received a precautionary layoff notice being placed on the District’s final layoff notice list; others may have their notices rescinded after the recommended actions contained in this order are completed.

Tie-Breaking Issue

17. The District established tie-breaking criteria to determine the order of termination for those employees who shared the same seniority dates. The District used that criteria for a group of teachers who shared a September 1, 2005, seniority date. After considering all tie-breaking criteria, the District identified three teachers who received lay-off notices.

Skipping Issue¹

¹ Although Resolution 11-115 provided for skipping employees who served as Academic Coaches, no evidence was introduced challenging that skip.

18. Education Code section 44955, subdivisions (b) and (c), set forth a general rule requiring school districts to retain senior employees over more junior employees and to retain permanent employees over temporary employees. Any exception to this general rule must be based on statute. Education Code section 44955, subdivision (d) provides:

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

19. Under Education Code section 44955, subdivision (d)(1), the District may skip a junior teacher being retained for specified reasons. (*Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, 131.) Junior teachers may be given retention priority over senior teachers only if the junior teachers possess superior skills or capabilities which their more senior counterparts lack. (*Santa Clara Federation of Teachers, Local 2393, v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 842-843.) A junior employee possessing special competence can be retained over a senior employee lacking such competence. (*Alexander v. Delano Joint Union High School District* (1983) 139 Cal.App.3d 567.)

20. The testimony of Assistant Superintendent Kim Phifer established that the Nestor Language Academy is a dual immersion program with the goal of providing a bilingual education to its students. The visual performing arts program offered at Mendoza Elementary School has three focus areas: visual arts, dance and music and incorporates the arts into the general education curriculum. Her testimony and that of Pamela Reichart-Montiel, the Director of Educational Services for the District and Guadalupe Avilez, the School Administrator at the Nestor Language Academy, now a charter school in the District, established that the District has a need for these two programs and properly skipped teachers in those programs.

21. Board Policy 4117 requires one year of experience in the position into which an employee wishes to bump. The District asserted that none of the respondents met this competency criterion which would enable them to bump into a teaching position.

22. Respondent Desiree Million testified about her extensive bilingual background and experience. Her testimony established that she would make an excellent candidate for employment at the Nestor Language Academy. Unfortunately, since she has never taught there, she did not meet the competency criterion and was properly noticed for lay-off.

23. Respondent Kathy Ashley has an impressive art education and experience. Her testimony established that she would make an excellent candidate for employment in the visual arts program. Unfortunately, since she has never taught in that program, she did not meet the competency criterion and was properly noticed for lay-off.

Seniority Dates Issues

24. Respondents Andrea Knox and Alexandra Smith challenged their seniority dates as listed on the District's seniority list. Their counsel admitted that their challenges did not affect the District's notice of lay-off. The District represented that it was unable to verify those dates during this hearing but would do so immediately thereafter. It is recommended the District verify the seniority dates for Respondents Andrea Knox and Alexandra Smith.

25. Respondent Beverly Gonzales challenged her seniority date as listed on the District's seniority list based upon summer training she had attended. Her counsel admitted that her challenge did not affect the District's notice of lay-off. During the hearing the District reviewed her seniority date and asserted that it was correct. Respondent presented no argument regarding the District's position and, absent any evidence to the contrary, her seniority date as listed on the District's seniority list is found to be correct.

Temporary Teacher Issues

26. Resolution 11-116 identified 13 certificated employees who were previously permanent teachers in the District, who were laid off in previous reduction in force proceedings and who were re-hired to teach in the District during the 2010-2011 under temporary contracts. Resolution 11-116 directed the District to notify all temporary teachers that they were not being re-employed for the 2011-2012 school year. In this proceeding the District sought to release them as temporary employees, but out of an abundance of caution served them with layoff notices, as well.

27. Several of those respondents asserted that the District improperly offered them temporary contracts in violation of their rehire rights in the Education Code.

28. Education Code section 44909 authorizes the District to hire temporary employees and outlines the rights of those employees. Most notably, the code section specifically provides that it does not apply "to any regularly credentialed employee who has been employed in the regular educational programs of the school district as a probationary employee before being subsequently assigned to any one of these programs."

29. Education Code section 44918 outlines the rights of temporary employees but specifically holds that “permanent and probationary employees subjected to a reduction in force pursuant to Section 44955 shall, during the period of preferred right to reappointment, have prior rights to any vacant position in which they are qualified to serve superior to those rights hereunder afforded to temporary and substitute personnel who have become probationary employees pursuant to this section.”

30. Education Code section 44954 authorizes Districts to release temporary employees.

31. Education Code section 44956 establishes the rights of permanent employees whose services are terminated. For 39 months, those employees have a preferred right of re-employment “in the order of original employment . . . if the number of employees is increased or the discontinued service is reestablished, with no requirements that were not imposed upon other employees who continued in service; provided, that no probationary or other employee with less seniority shall be employed to render a service which said employee is certificated and competent to render.” An employee may waive that right and a district may deviate from re-employing in order of seniority if it “demonstrates a specific need” or to maintain or achieve “compliance with constitutional requirements.”

32. Section 44956 further provides that when the employee is reappointed, “the period of his absence shall be treated as a leave of absence and shall not be considered as a break in the continuity of his service, he shall retain the classification and order of employment he had when his services were terminated, and credit for prior service under any state or district retirement system shall not be affected by such termination, but the period of his absence shall not count as a part of the service required for retirement.” An employee may be hired as a substitute teacher but the substitute service shall not affect his previous classification and rights.

33. Taken together, these provisions show that the Legislature recognized that districts may need to hire and release temporary teachers, that those employees have various rights to re-employment and seniority status, but specifically distinguished those temporary employees from teachers who were formerly permanent or probationary employees of the district laid off during a reduction in force proceeding and then re-hired by the district. Former employees have rights superior to those of temporary or substitute teachers who were not formerly employed as permanent or probationary employees.

34. The District asserted that it properly labeled the employees as temporary employees because they were placed in categorically funded positions and/or the number of employees did not increase after last year’s layoff and the discontinued service was not reestablished. However, most of those arguments were specifically rejected in *Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 339, 407. Citing to *Martin v. Kentfield School Dist.* (1983) 35 Cal.3d 294, 300, the *Poppers* court held that the California Supreme Court has determined that “the legislative intent underlying section 44956 is to provide terminated employees with the same employment rights they would have enjoyed

had they been retained by the school district. (*Poppers, supra* at p. 405.) As between the reappointment rights of a senior terminated teacher vis-a-vis a junior teacher certificated and competent to perform the same services for the district, the senior teacher prevails. (*Poppers, Id.* at p. 407.)

35. Consistent with the Education Code and case law, the previously laid off employees had re-employment rights and when re-hired were entitled to be re-instated as though they had not been laid off. Accordingly, any of the respondents with sufficient seniority may bump into a position being held by a junior employee, despite their being improperly identified as a “temporary employee” by the District. Moreover, to allow a district to offer only “temporary contracts” to previously laid off employees not only violates the clear Legislative intent of the Education Code but would lead to the unjust result that an employee re-employed for 40 months as a temporary employee would lose his rights of re-hire, despite being re-employed each year. It was clear during this proceeding that most respondents were unaware that their “39 month clock” was running even when re-employed by the District because they were improperly told that they were working under a temporary contract.

36. Any of the 13 respondents identified in Resolution 11-116, who is certificated and competent, and who is senior to a certificated employee who was not laid off, was improperly noticed; the notice should be rescinded and that respondent should be retained.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to sections 44949 and 44955, and all notices and other requirements of those sections have been provided as required.

2. A district may reduce services within the meaning of section 44955, subdivision (b), “either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may ‘reduce services’ by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved.” (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

3. Because of the reduction of particular kinds of services, cause exists pursuant to Education Code section 44955 to give notice to respondents that their services will not be required for the 2011-2012 school year. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949. The district has identified the certificated employees who are providing the particular kinds of services that the Governing Board directed be reduced or discontinued. It is recommended that the Governing Board give respondents notice before May 15, 2011, that their services will not be required by the District for the school year 2011-12.

4. A preponderance of the evidence sustained most of the charges set forth in the accusation.

RECOMMENDATION

It is recommended that the governing board give notice to the respondents whose names are set forth below in Appendix A, that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2011-2012 school year.

It is recommended that pursuant to the Findings of Fact Nos. 26-36, inclusive, that for the respondents identified in Appendix B, as well as any of the 13 respondents identified in Resolution 11-116, who are certificated and competent, and who are senior to a certificated employee who was not laid off, were improperly noticed; their notices should be rescinded and those respondents should be retained.

The precautionary layoff notices issued to those respondents identified in Appendix C should be rescinded and the accusations dismissed.

DATED: _____

MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings

Appendix A

Ashley, Kathy
Ball, Stephen
Bezak, Hazel
Davis, Laura
Emmons, Marc
Gonzalez, Beverly
Johnson, Amber
Knox, Andrea
Malls, Elizabeth
Medina, Helena
Mercado, Hilda
Million, Desiree
Nichols, Kymberly
Parker, Karen
Reichert, Deborah
Sullivan, Kelly
Sumaya Jr., Alfonso

Appendix B

Arancibia, Candice
Bajo, Olga
Cuevas, Lorena (.5 FTE)
Guadiana, Carol
Kuenzi, Kayne
McKinney-Nokes, Kathleen (.5 FTE)
Meyer, Jenni
Nelson, Michelle
Pehrson, Erika
Robles, Brenda
Smith, Alexandra

Appendix C

Ambriz, Saul
Camargo, Irene
Cappadona, Laura
Diaz, Delia
Garcia, Gwendolyn
Guido, Annalicia
Macias, Salvador
Rogan, Kathleen
Ruvalcaba, Carolina
Syverson, Michelle
Uribe, Delia
Vaca, Teresa
Villegas Jr., Jose
Villegas, Patricia